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ORIGINAL

NO. 87-6173

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

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SUPREME COURT, U.S.

WILLIE JASPER DARDEN,

Petitioner,

vs.

RICHARD L. DUGGER, Secretary,
Florida Department of Corrections,

Respondent.

RESPONSE FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED
(Renumbered and rephrased)

1. Whether the lower court's opinion is in conflict with this court's decisions in **Sanders v. United States**, 373 U.S. 1 (1963); **Kuhlmann v. Wilson**, 106 S.Ct. 2616 (1986); **Blackledge v. Allison**, 431 U.S. 75 (1977); **Townsend v. Sain**, 372 U.S. 293 (1984); and **Strickland v. Washington**, 466 U.S. 668 (1984), and in conflict with 28 U.S.C. § 2244(b), 28 U.S.C. §2254, and Rule 9(b) of the Rules Governing Section 2254 Cases?

2. Whether it is an abuse of discretion for a federal district court judge to summarily dismiss a second or subsequent petition brought by a petitioner pursuant to 28 U.S.C. §2254, without considering whether (a) claims previously raised should be addressed again in the interest of justice, and whether (b) with respect to a claim raised for the first time, the petitioner, as opposed to his counsel, knowingly, intelligently, and intentionally failed to raise the claim earlier?

(a) Whether new evidence concerning the time of the offense, which faults trial counsel's effectiveness in investigating alibi, should be barred from consideration by Rule 9(b), Rules Governing Section 2254 Cases?

(b) Whether petitioner's claim of impermissibly suggestive identification procedures should be addressed on the merits when it was previously raised in an earlier habeas corpus petition and then withdrawn and abandoned?

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RESPONSE FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Respondent, **Richard L. Dugger**, prays that a writ of certiorari not issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit which was filed August 5, 1987, and states:

CITATION TO OPINION BELOW

The opinion of the Court of Appeals is reported at 825 F.2d 287 (11th Cir. 1987), and is contained in Petitioner's Appendix A. The order of the United States District Court, Middle District of Florida, dismissing the petition for writ of habeas corpus, is contained in Petitioner's Appendix B.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth Amendment to the Constitution of the United States, which provides in relevant part:

> In all criminal prosecutions, the accused shall enjoy the right to. . .have the assistance of counsel for his defense;

the Eighth Amendment which provides in relevant part:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted;

and the Fourteenth Amendment to the Constitution, which provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law. . .

It also involves §921.141, F.S. (1979), which may be found in Petitioner's Appendix C.

I. STATEMENT OF THE CASE

A. CASE HISTORY

Petitioner was tried and found guilty of murder, robbery, and assault with intent to kill in the Circuit Court of Citrus County, Florida, in January, 1974. The jury recommended a death sentence, and the trial judge followed that recommendation. On direct appeal, the Florida Supreme Court affirmed the conviction and sentence. **Darden v. State**, 329 So.2d 287 (Fla. 1976).

Petitioner sought a petition for writ of certiorari in the United States Supreme Court based on issues surrounding the in-court identification, the exclusion of prospective jurors, and the prosecutor's closing arguments. That petition was granted on November 1, 1976. **Darden v. Florida**, 429 U.S. 917 (1976). By order dated January 10, 1977, the court limited review to the sole issue dealing with the prosecutor's closing argument. **Darden v. Florida**, 429 U.S. 1036 (1976). That issue was briefed and orally argued, and on April 29, 1977, the court entered an order dismissing the writ of certiorari as having been improvidently granted. **Darden v. Florida**, 430 U.S. 704 (1977).

A death warrant was signed by the governor of Florida on April 18, 1979. After unsuccessfully seeking review in the trial court, Petitioner then sought federal habeas corpus relief in the United States District Court for the Middle District of Florida, Tampa Division. On May 22, 1979, that court stayed the execution and assigned the case to a Magistrate. Petitioner ultimately presented some twenty-five (25) constitutional claims. The Magistrate ordered a hearing on the ineffective assistance of counsel claim, and said hearing was held on October 22-23, 1979. Approximately a year and a half after the hearing, the Magistrate filed a report recommending that relief be denied on all claims except the ones concerning the prosecutor's closing arguments and the excusal of prospective jurors--the "Witherspoon" issue. Both parties filed objections to the report and ultimately the District Court issued its memorandum opinion rejecting the Magistrate's findings regarding the above-mentioned issues, and denied relief on all grounds presented. **Darden v. Wainwright**, 513 F.2d 947 (M.D. Fla. 1981).

The judgment of the District Court was appealed to the Eleventh Circuit Court of Appeals. Petitioner presented three constitutional issues involving the prosecutor's closing arguments, ineffective assistance of counsel, and excusal of prospective jurors. On February 14, 1983, the court affirmed the judgment of the District Court by a divided panel. **Darden v. Wainwright**, 699 F.2d 1031 (11th Cir. 1983). Rehearing en banc was sought and granted, and on July 1, 1983, because the en banc panel was equally divided, six-to-six, by operation of law the decision of the District Court was affirmed. **Darden v. Wainwright**, 708 F.2d 646 (11th Cir. 1983). A second petition for rehearing en banc was filed on July 22, 1983. (On August 5, 1983, a second death warrant was signed by the governor

of Florida.) The second petition for rehearing was granted, and the execution was stayed. **Darden v. Wainwright**, 715 F.2d 502 (11th Cir. 1983). The Court of Appeals then rendered an en banc decision which affirmed the District Court on the issues surrounding the closing argument, and the ineffective assistance of counsel, and reversed on the "Witherspoon" issue. **Darden v. Wainwright**, 725 F.2d 1526 (11th Cir. 1984).

Respondent filed a petition for writ of certiorari in the United States Supreme Court seeking review of the Eleventh Circuit's decision regarding the "Witherspoon" issue. Petitioner also filed a petition for writ of certiorari seeking review of the remaining issues. Darden's petition was denied, 104 S.Ct. 2688 (1984). The Respondent's petition was granted, the judgment of the Court of Appeals was vacated, and the cause remanded for consideration in light of **Wainwright v. Witt**, 469 U.S. _____, 105 S.Ct. 844 (1985). **Wainwright v. Darden**, 105 S.Ct. 1158 (1985).

On remand by opinion dated July 23, 1985, the en banc court of the Eleventh Circuit issued its judgment, voting ten-to-two, to reinstate the original panel opinion (699 F.2d 1031). The en banc court affirmed the District Court's denial of Darden's habeas petition. **Darden v. Wainwright**, 767 F.2d 752 (11th Cir. 1985).

A third death warrant was signed on August 8, 1985. Petitioner returned to the state court seeking habeas corpus relief and relief pursuant to Fla.R.Crim.P. 3.850. The habeas petition contended that on direct appeal to the Florida Supreme Court, counsel provided ineffective assistance. Relief was denied, **Darden v. State**, 475 So.2d 214 (Fla. 1985). In his motion to vacate application, Petitioner raised seven claims. Relief was denied in the trial court and that denial was affirmed on appeal, **Darden v. State**, 475 So.2d 217 (Fla. 1985).

Petitioner then filed an application for stay of execution in the United States Supreme Court, and "lodged" a petition seeking federal habeas corpus relief in the United States District Court, Middle District of Florida. On September 3, 1985, the Supreme Court denied Darden's application for stay of execution, 106 S.Ct. 20 (1985). The petition in the District Court was then activated on that same date. The District Court dismissed the petition with prejudice as an abuse of the writ. **Darden v. Wainwright**, Case No. 85-1420-Civ-T-10 (M.D. Fla. 1985).

Petitioner then filed an emergency motion for stay of execution and a motion for certificate of probable cause with the Eleventh Circuit Court of Appeals. All relief was denied September 3, 1985. Darden v. Wainwright, 772 F.2d 66 (11th Cir. 1985). Rehearing en banc was sought in the Eleventh Circuit Court of Appeals from the judgment of the panel denying his certificate of probable cause. Relief was denied. **Darden v. Wainwright**, 776 F.2d 1057 (11th Cir. 1985). A petition for writ of certiorari was filed in the United States Supreme Court directed to the denial of rehearing. Review was denied. **Darden v. Wainwright**, 106 S.Ct. 3309 (1986).

On September 3, 1985, Petitioner requested the Supreme Court to treat his previously filed application for stay of execution as a petition for writ of certiorari and at approximately 11:30 p.m. that day, the court complied with Petitioner's request. By order, the court vacated the order denying the application for stay of execution, stayed the execution, and granted certiorari review. Darden v. Wainwright, 106 S.Ct. 21 (1985).

On the merits before the Supreme Court, Petitioner raised issues challenging the prosecutor's closing argument, the effective assistance of counsel both at trial and at sentencing, and the exclusion of prospective jurors. The

Supreme Court denied relief, affirmed the decision of the Eleventh Circuit Court of Appeals in all respects. **Darden v. Wainwright**, 106 S.Ct. 2464 (1986).

A fourth death warrant was signed August 5, 1986. Since rehearing of this Court's judgment had been filed, the stay of execution previously entered was still in force. This Court denied rehearing on September 3, 1986, and although the period of warrant still had time remaining, Petitioner was not executed.

On August 29, 1986, Petitioner filed a petition for habeas corpus in the Florida Supreme Court seeking relief based on the grant of review of the issues involved in **Hitchcock v. Wainwright**, 77 F.2d 1514 (11th Cir. 1985), and **McCleskey v. Kemp**, 753 F.2d 877 (11th Cir. 1985). On October 3, 1986, the Court denied relief holding that such a claim was improperly sought in habeas corpus and it should be presented in a motion to vacate in the trial court. **Darden v. Wainwright**, 495 So.2d 179 (Fla. 1986).

A fifth death warrant was signed on September 24, 1986, setting the execution for October 21, 1986.

Petitioner returned to the trial court in Florida via a motion to vacate under Rule 3.850, Fla.R.Crim.Pro., raising the **McCleskey/Hitchcock** issue and a claim of ineffective assistance of counsel. Relief was denied by the trial court and the Florida Supreme Court affirmed said denial, holding that said Petitioner was procedurally barred as a matter of law from obtaining relief. **Darden v. State**, 496 So.2d 136 (Fla. 1986).

A third petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, was filed in the United States District Court, Middle District of Florida, Tampa Division. Therein, Petitioner raised three issues. One, that he was entitled to relief pursuant to a "McCleskey/Hitchcock" issue; two, that his lawyer rendered ineffective assistance of counsel

by failing to develop alibi information; and three, the impermissably suggestive in-court identification by the two eye-witnesses to the murder. District Judge Hodges denied relief on all grounds, dismissing the third petition as an abuse on October 16, 1986. An appeal was filed challenging said finding, and on August 5, 1987, the Eleventh Circuit Court of Appeals, affirmed the denial of federal habeas corpus relief based on abuse of discretion, **Darden v. Dugger**, 825 F.2d 287 (11th Cir. 1987). No petition for rehearing was filed.

B. FACTS

The Eleventh Circuit Court of Appeals, in its most recent opinion, 825 F.2d at 288-290, detailed the facts as they appeal in four different courts which have previously reviewed this case. See **Darden v. Wainwright**, 477 U.S. 197, 106 S.Ct. 2467, 91 L.Ed.2d 144 (1986); **Darden v. Wainwright**, 699 F.2d 1031 (11th Cir. 1983); **Darden v. Wainwright**, 513 F.Supp. 947 (M.D. Fla. 1981); **Darden v. State**, 329 So.2d 287 (Fla. 1976). A copy of **Darden v. Dugger**, is attached to Petitioner's petition, appendix A.

The crucial facts germaine to the instant issues are as follows:

> On September 8, 1973, at about 5:30 p.m., Petitioner entered Carl's Furniture Store near Lakeland, Florida. The only other person in the store was the proprietor, Mrs. Turman, who lived with her husband in a house behind the store. Mr. Turman who worked nights in a juvenile home, had awakened at about 5:00 p.m., had a cup of coffee at the store with his wife, and returned home to let their dogs out for a run. Mrs. Turman showed Petitioner around the store. Petitioner stated that he was interested in purchasing about $600.00 worth of furniture for a rental unit, and asked to see several items. He left the store briefly, stating that his wife would be back to look at some of the items.

> Petitioner returned a few minutes later, asked to see some stoves, and inquired about the price. When Mrs. Turman turned toward the adding machine, he grabbed her and pressed a gun to her back, saying "Do as I say and you won't get hurt." He took her to the rear of the store and told her to open the cash register. He took the money, then ordered her to an area of the store where some box springs and mattresses were stacked against the wall. At that time Mr. Turman appeared at the back door, Mrs. Turman screamed while Petitioner reached across her right shoulder and shot Mr. Turman between the eyes. Mr. Turman fell backwards, with one foot partially in the building. Ordering Mrs. Turman not to move, Petitioner tried to pull Mr. Turman into the building and close the door, but could not do so because one of Mr. Turman's feet was caught in the door. Petitioner left Mr. Turman face up in the rain and told Mrs. Turman to get down on the floor, approximately five (5) feet from where her husband lay dying. While she begged to go to her husband, Petitioner told her to remove her false teeth. Petitioner unzipped his pants, unbuckled his belt, and demanded that Mrs. Turman perform oral sex on him. She began to cry "Lord, have mercy." He told her to get up and go towards the front of the store.
>
> Meanwhile, a neighboring family, the Arnolds, became aware that something had happened to Mr. Turman. The mother sent her 16 year old son Phillip, a part-time employee at the furniture store, to help. When Phillip reached the back door he saw Mr. Turman lying partially in the building. When Phillip opened the door to take Mr. Turman's body inside, Mrs. Turman shouted "Phillip, no, go back." Phillip, not knowing what she meant, asked Petitioner, who he could see because the light bulb inside the door was on, to help him get Mr. Turman inside. Petitioner replied, "Sure, buddy, I will help you." As Phillip looked up, Petitioner was pointing the gun in his face. He pulled the trigger and the gun misfired; he pulled the trigger again and shot Phillip in the mouth. Phillip started to run away and was shot a second time in the neck. While

> he was still running, he was shot a third time in the side. Despite these wounds, Phillip managed to stumble to the home of a neighbor, Mrs. Edith Hill. Mrs. Hill testified that she heard four shots fired--a single shot then three in a row--at approximately 3:00 p.m. Mrs. Hill had her husband call an ambulance while she tried to stop Phillip's bleeding. While she was helping Phillip she saw a late model green Chevrolet leave the store and head towards Tampa on State Highway 92. Phillip survived the incident; Mr. Turman, who never regained consciousness, died later that night.

Darden v. Dugger, 825 F.2d at 288-289.

At trial, John Stone testified that at approximately 6:00 p.m. on September 8, 1973, he was on his way home from the beach with his family when he was in a near accident on Highway 92. (Trial record 307-308) The car that nearly hit his drove off the road, slid, went into a ditch and hit a telephone pole (Trial record 310). Mr. Stone went back to the accident scene to see if the driver was hurt and he saw Petitioner crawling out of the passenger side of the car. Petitioner pulled his shirt off and then walked in front of the car to check for damage to the car. (Trial record 324) As Mr. Stone approached, he observed Petitioner reach down and zip up his pants and buckle his belt buckle (Trial record 313).

Mary Simmons was driving towards Plant City that day when near the Lakeland Lounge she saw that a man had run off the highway. (Trial record 330) She offered to give him a ride and testified that she picked Petitioner up at about 6:30 p.m. (Trial record 331) She recalled the time because she had been listening to the radio station and the news had just ended. (Trial record 331-333)

At trial, both Mrs. Helen Turman and Mr. Phillip Arnold positively identified Petitioner as the man who shot Mr. Turman and shot Mr. Arnold. Mrs. Turman testified that prior to trial she only saw Petitioner on two occasions:

on the day of the crime, September 8, 1973, and then again at a preliminary hearing held September 13, 1973. At the preliminary hearing and at the trial, Mrs. Turman had no difficulty identifying Petitioner. Mrs. Turman testified that Petitioner had been in the store for approximately ten to fifteen minutes and she was able to observe him, and that there was no question in her mind that Petitioner had killed her husband (Trial record 231). Although she testified on cross-examination that she did not remember, nor could she describe the clothing he wore in great detail, she always remembered faces, especially of her customers, and that she was good at remembering faces (Trial record 232). Mrs. Turman also testified that although she saw no photos, nor was she asked to pick out Petitioner in a line-up, she had no difficulty identifying Petitioner. She indicated that between the time of the crime and the day of trial, she had not read newspaper accounts, nor seen pictures of Petitioner in the newspaper (Trial record 216). She was also able to point out differences in Petitioner's appearance at the time of trial from that of his appearance at the time of the crime. She testified that at trial he had grown a goatee, and that his hair was not combed down like it had been the day of the crime. She also indicated that he had lost weight (Trial record 225, 278-279). On cross-examination, Mrs. Turman testified that after Petitioner left the store, she called the police, checked her husband's condition, and then called her sister and her pastor (Trial record 242).

Phillip Arnold's testimony at trial positively identified Petitioner as the person who tried to kill him. He also was able to identify differences in Petitioner's appearance at the trial from that of the day of the shooting. He testified that the man who shot him was a heavy set dark man with neat hair, dark colored pants and a dull,

light shirt which had a ring around the collar. (Trial record 443). At trial, Mr. Arnold testified that Petitioner appeared to have lost weight, that his hair was different, and that he had a little beard which he had not had before (Trial record 493). During the course of Mr. Arnold's testimony, defense moved to have all evidence concerning Arnold's identification of Petitioner in his photo line-up excluded. The trial court granted said motion however allowed an in-court identification of Petitioner. (Trial record 487).

On October 22 and October 23, 1979, Petitioner presented testimony in an evidentiary hearing regarding whether his trial counsel rendered ineffective assistance of counsel for failing to totally investigate an alibi defense. One of the contentions supporting this claim was that defense counsel had available to him, the testimony of Christine Bass who could have testified that between 4:00 p.m. and 5:30 p.m. on September 8, 1973, Willie Darden was in front of her house. See Petitioner's Appendix E. The Eleventh Circuit Court of Appeals in **Darden v. Wainwright**, 699 F.2d 1031 at 1037 (11th Cir. 1983), stated:

> We have carefully examined the record in this case and found that the performance of Darden's defense counsel, during either the guilt of penalty phase of the trial, did not fall below the "reasonably effective assistance" standard.

During the course of the federal hearing on October 22 and October 23, 1979, defense counsel testified that a decision not to put on Christine Bass and other witnesses for an alibi defense was based on reasoned decision between defense counsel and Petitioner. This court affirmed the Eleventh Circuit Court's finding that defense counsel, Mr. Goodwill, rendered effective assistance of counsel. Specifically, this Court held:

> . . .Defense counsel engaged in extensive preparation prior to trial, in a manner that included preparation for sentencing. Mr. Jack Johnson, head of the public defender's office at the time, stated to the habeas courts that "I would say we have expended more man hours on this case than any case to my knowledge." (Record 320) Mr. Goodwill, an experienced trial lawyer, testified that he "spent more time on this case than I spent on . . . any capital case I have been involved in, probably more time than any case I have ever been involved in." (cite omitted) That included time investigating petitioner's alibi and driving petitioner around the scene of events to establish each point of his story. Counsel obtained a psychiatric report on petitioner, with an eye toward using it in mitigation during sentencing. Counsel also learned in pre-trial preparation that Mrs. Turman was opposed to the death penalty, and considered the possiblity of putting her on the stand at the sentencing phase. The record clearly indicates that a great deal of time and effort went into the defense of this case; a significant portion of that time was devoted to preparation for sentencing.

Darden v. Wainwright, 106 S.Ct. at 2472.

On October 10, 1986, two affidavits were prepared, one by Rev. Sam Sparks and the other by Rev. David A. Hess in behalf of Petitioner. See Petitioner's Appendix F and G. Rev. Sparks states in his affidavit that on September 8, 1973, at approximately 5:30 p.m., he received a telephone call from Rev. Earl Sprowls, his predecessor at the First Church of Nazarene in Lakeland, Florida. Rev. Sparks testified that Rev. Sprowls asked him to go with him over to the Turman's furniture store because Mr. Turman had been shot. Rev. Sparks affidavit reflects that:

> When we arrived at the Turmans', I mentioned to Rev. Sprowls that I really needed to be back home at 6:30. I looked at my watch and it was 5:55. I always keep my watch on the correct time and it was correct on that afternoon.
>
> * * *
>
> Based on when I got the call from Rev. sprowls and what time it was when we got over to the Turmans'

> there is simply no way in heaven the crime could have occurred after 5:30. If fact, I would say it had to be no later than 5:00 or 5:15.
>
> * * *
>
> Shortly after Rev. Hess came to see me, I got a call from Mrs. Bass. She said she was certain Mr. Darden was in front of her house from 4:00 p.m. until 5:25 or 5:30 the afternoon of the murder. I knew then he couldn't have done it because the crime had to have happened some time before 5:30.

Petitioner's Appendix F.

Rev. Hess' affidavit reflects that based on his conversations with Rev. Sparks and his conversations with Christine Bass, he put Rev. Sparks and Mrs. Bass in touch with one another. Specifically, he stated:

> I have to say, it took a while for me even to entertain the notion that the wrong man might have been arrested and convicted.
>
> It was not until I came to understand the import of Mrs. Bass' testimony that I realized it matter, in any legal sense, that Sam Sparks had been over at the Turmans right after the crime. Other than Mrs. Bass, I was the only person who realized the significance of putting together Rev. Sparks' experience and Mrs. Bass' account of Mr. Darden being at her house at 5:30 until the two of them compared notes just recently. I am thankful that I have been able, after so many years, to bring together the two individuals having this crucial information and regret that it has taken until now for it all to add up.

Petitioner's Appendix G.

Armed with these two new affidavits, Petitioner has asserted before the state and federal courts, that these affidavits evidence his innocence and evidence defense counsel's ineffectiveness for failing to develop an alibi defense at trial.

REASONS FOR DENYING THE WRIT

I.

The lower court opinion in **Darden v. Dugger**, 825 F.2d 287 (11th Cir. 1987), is not in conflict with this Court's decisions in **Sanders v. United States**, 373 U.S. 1 (1963); **Kuhlmann v. Wilson**, 106 S.Ct. 2616 (1986); **Blackledge v. Allison**, 431 U.S. 75 (1977); **Townsend v. Sain**, 372 U.S. 293 (1963); and **Strickland v. Washington**, 466 U.S. 668 (1984); and in conflict with 28 U.S.C. §2244(b), 28 U.S.C. §2254, and Rule 9(b) of the Rules Governing Section 2254 cases.

The Eleventh Circuit Court of Appeals is not in conflict with the above-cited cases. In fact, in a detailed review of the issues presented, the court reviewed the actions of the federal district court judge and concluded that:

> Petitioner contends that the district court order of dismissal requires reversal because the court did not address the claims presented within the proper analytical framework. We disagree. District Judge Hodges has handled these petitions for habeas corpus relief since May, 1979. The dismissal of the third petition is proper. While we do not agree with the district court's reasoning that the submission of the third petition is a fortiori abuse because the filing of the second petition constitutes an abuse, Darden, No. 86-1456-Civ-T-10(c) page 2 (M.D. Fla. October 16, 1986), we do agree that it was within the district court's sound discretion to dismiss the third petition without hearing. The record amply supports Judge Hodges' decision.

825 F.2d at 292 (f.15)

The court discussed its role in determining under **Sanders v. United States, supra**, whether a second or successive application should be denied without consideration of the merits. The court stated:

> Petitioner's third application for federal habeas relief contained three claims. Two of the three claims have been decided on the merits in previous petitions. It was within the district court's discretion to dismiss those two claims unless the petitioner established that the ends of justice would be served by reconsideration

of the claims. [Cites omitted] Whether the ends of justice require reconsideration is determined by objective factors, such as "whether there was a full and fair hearing on the original petition or whether there was an intervening change of the facts of the case or the applicable law." [Cite omitted] "[T]he ends of justice" requires federal courts to entertain [successive] petitions only where the prisoner supplements his constitutional claim with a colorable showing of factual innocence.

The remaining claim was presented in petitioner's first petition for habeas corpus relief filed in May, 1979, but withdrawn and abandoned. Since the state has affirmatively pled abuse of the writ in its motion to dismiss the third petition, petitioner has the burden to rebut the state's contention. [Cite omitted] Petitioner must demonstrate that the failure to present the claim in the prior federal habeas proceeding was "neither the result of an intentional abandonment or withholding, nor the product of inexcusable neglect." [Cite omitted] The concept of "abuse of the writ" is founded on the equitable nature of habeas corpus. Thus, a federal court may dismiss a subsequent petition on the ground that petitioner abused the writ when the petitioner files a petition raising grounds that were available but not relied on in a prior petition, [cite omitted] or engages in other conduct that "disentitles him to the relief he seeks." [Cite omitted] With these principles in mind, we turn to the three claims presented.

825 F.2d at 292-293

Contrary to Petitioner's assertion herein, **neither conflict nor federal questions arise** regarding the standards utilized by the Eleventh Circuit in reviewing the following claims.

II.

No abuse of discretion has been demonstrated by the federal district court judge or the Eleventh Circuit in dismissing a second or subsequent petition brought by petitioner pursuant to 28 U.S.C. §2254, without consideration of whether (a) claims previously raised should be addressed again in the interest of justice, and whether (b) with respect to a claim raised for the first time, the Petitioner as opposed to his counsel, knowingly, intelligently and intentionally failed to raise the claim earlier.

Petitioner raises two claims for review. Couched in terms that he is innocent of the crimes charged, he asserts that the two affidavits from Rev. Sparks and Rev. Hess support his contention that his trial counsel rendered ineffective assistance of counsel at trial in failing to determine an alibi defense, and second that the in-court identificatin by Mrs. Turman and Mr. Arnold of Petitioner was based on impermissibly suggestive identification procedures.

A. Counsel did not render ineffective assistance of counsel for failing to reasonably investigate the time of the offense when alibi was the defense.

Bottomed on the rather belated affidavits of Rev. Sparks and Rev. Hess, Petitioner argues that Mr. Turman's murder occurred between 5:00 p.m. and 5:15 p.m. and therefore he could not have committed this crime. Petitioner previously asserted that trial counsel rendered ineffective assistance of counsel for failure to develop and investigate his alibi. This court, in **Darden v. Wainwright**, 106 S.Ct. 2464 (1986) held otherwise. Petitioner now attempts, post that decision, to present a different set of facts to support the same assertion. He grounds his ability to do so on the fact that the affidavits prepared in October, 1986 were only made known to him at that time and therefore he should be permitted to escape the holdings of previous court review.

At trial in 1974, in the face of evidence indicating the time of the accident (specifically Mary Simmons' testimony that she picked Petitioner up at the scene of the accident at approximately 6:30 or 6:40 P.M. [Trial Record, page 331]), Petitioner testified that a few minutes either side of 6:00 p.m., he was at Plant City, Florida, having been given a ride there by Mary Simmons. (Trial record, 640.)

Further, he testified that at approximately 6:45 p.m., five to fifteen minutes after Mary Simmons said she picked him up in Lakeland, he walked into his girlfriend's home in Tampa, Florida. (Trial record, 579.)

In 1979, at the federal habeas hearing, Petitioner again maintained that at 6:45 p.m. on the day of the murder, he was in Tampa, Florida. (He also testified that he had information that the crime occurred at approximately 5:30 p.m.). That testimony formed the basis of the claim that he received ineffective assistance of counsel in that his attorneys failed to determine the correct time of the commission of the murder. In that proceeding, the times were utilized to fault the investigative abilities of the attorneys since the position was advanced that the car accident and the crime were committed at approximately the same moment. In his objections to the report and recommendation of the Magistrate, counsel took issue with the Magistrate's failure to note the obvious discrepancy that the assailant was on the premises at the time the sheriff's office received a call about the murder, and that Petitioner was some three miles away involved in an accident at approximately the same time. The theme of Petitioner's inability to be physically present in two different places at the same time was repeated in the initial appeal to the Eleventh Circuit Court of Appeals. It was repeated and enhanced in Darden's en banc pleadings in 1981.

In 1986, Petitioner again relied on the 5:30 p.m. time of commission of the crime theory and again accused his attorneys of not knowing, through lack of investigation, the precise time that the crime was committed. This was and is the same claim but with a different time. Previously, Petitioner asserted his lawyers were ineffective because they did not know that at the time he was involved in an accident, the perpetrator was still on the premises at Carl's

Furniture Store, some three miles away. Now, these same lawyers are ineffective for not knowing that the crime was committed approximately an hour earlier than previously alleged. This new assertion is predicated on "newly discovered evidence" in the form of affidavits prepared by Revs. Sparks and Hess, which materialized but a few days before the last scheduled execution. Relying more heavily on the affidavit of Rev. Sparks, Petitioner takes comfort in the fact that Rev. Sparks states that he flatly was at the scene of the crime at 5:55 p.m., September 8, 1973, and observed activity which indicated to him that the crime had been long since committed. Rev. Sparks' opinion was that the crime could not have been committed any later than 5:00 or 5:15 p.m. Based on the hearsay of Christine Bass, Rev. Sparks ultimately concluded that Petitioner was innocent since he could not have committed the crime at 5:00 or 5:15 p.m. since he was in front of the Bass house on or about that time.

Rev. Hess' affidavit merely supports the assertion that Christine Bass and Rev. Sparks got together some 13 years later.

In spite of these new revelations, it is submitted that, and the Eleventh Circuit Court agreed, there are no discrepancies in the time regarding the commission of the crime. Every single source of evidence clearly established that the crime was committed at or around 6:00 p.m. or shortly thereafter. On the day of the murder Mr. Turman, the victim, was working a midnight shift at a nearby juvenile home. At approximately 5:00 p.m. he was asleep in his home, which was located approximately 50 to 60 feet behind the furniture store. At that time, Mrs. Turman called to awaken him. A few minutes later he came over to the store and he and Mrs. Turman had a cup of coffee. After having coffee, the couple returned to the house to feed their dogs and let

them out for an exercise run. See **Darden v. Wainwright**, 106 S.Ct. 2464, 2367 (1986). After this activity, Mrs. Turman returned to the store alone sometime between 5:30 and 6:00 p.m.

Mrs. Hill heard the first shot while washing dishes. She testified that this was approximately 6:00 p.m. since she was washing the supper dishes, and she always had supper at 5:30 p.m. It was at this time that she saw Phillip Arnold running toward her house and at the same time saw a greenish Chevrolet pulling away from the area of the store.

John Stone witnessed Darden having an automobile wreck at approximately 6:00 p.m. Mary Simmons came on the accident scene after listening to the 6:30 news on the radio. She gave Petitioner a ride about 6:30 or 6:40. Calls reporting the accident were received by the Lakeland Police Department at 6:31 p.m. and the Hillsborough County Sheriff's Office at 6:32 p.m.

It is clear that the overwhelming evidence of time of commission is squarely contrary to the contents of Rev. Sparks affidavit. Petitioner makes reference to a transcript of a hearing held on January 9, 1974, which he claims clearly shows the crime to have been committed at 5:30 or earlier. This, together with Rev. Sparks' affidavit, Darden argues is conclusive evidence of his innocence. Citing to **Kuhlmann v. Wilson, supra**, he asserts that he has made a colorable showing of innocence. Respondent would respectively urge not so.

In light of **Kuhlmann v. Wilson, supra**, even if the issue was viewed purely in an evidentiary posture, had Sparks been present at trial and provided testimony that he subsequently did thirteen years later, the question would be whether there exists a fair probability that the trier of fact would have entertained a reasonable doubt of his guilt. Petitioner has raised no doubt, and the Eleventh Circuit Court of Appeals concurred:

> After reviewing the record in its entirety, we conclude that petitioner has failed to meet his burden of showing that the ends of justice require a federal court to revisit his claim for a sixth time.[18]
>
> [18]Since petitioner has failed to meet his burden of showing that the ends of justice require revisiting the claim under a sound discretion standard, it follows that he failed to meet the heavier burden of "colorable showing of factual innocence" which would be determined by reverence to all probative evidence of guilt or innocence. Kuhlmann v. Wilson, 106 S.Ct. at 2627, n.17 [emphasis by court]

825 F.2d at 294.

It is also important to remember that this issue was raised in terms of ineffective assistance of counsel. Temporarily disregarding the fact that this Court has already determined as a matter of law counsel acted effectively in this case, the same conclusion can be reached in response to the new allegations of time. Both at the district court level and before the Eleventh Circuit Court of Appeal and before this Court, the claim was and is made that both the police and the prosecution assumed the crime occurred at 5:30 p.m. Petitioner said his lawyers should have listened carefully to this evidence and because they did not, they were ineffective. The source of this evidence is the reference to the transcript of a pre-trial hearing held January 9, 1974. On page 9 and 10 of the instant petition, Officer George Elliot of the Polk County Sheriff's Department, was asked questions about the events leading up to Darden's arrest. Officer Elliot testified that he received information that Willie Darden was driving a car that was involved in the accident around 6:30 p.m., approximately an hour after the shooting. This information with regard to a 5:30 commission of the crime time was brought out through inquiry of Mr. Elliot by defense counsel. To urge that defense counsel's assistance was lacking because he did not emphasize

this fact in the face of four witnesses testifying the crime occurred at 6:00 p.m. is absurd. In dismissing the claim, the Eleventh Circuit further observed in footnote 19:

> We recognize that this issue was raised in terms of ineffective assistance of counsel. This court, Darden, 699 F.2d at 1037 (effective at guilt and penalty phase) as well as the Supreme court, Darden, 106 S.Ct. at 2473 (effective at penalty phase) has determined that petitioner received effective assistance of counsel. The allegation of time error in the affidavit presented did not alter what has been determined regarding counsel's performance as a matter of law.

825 F.2d at 294.

B. No impermissibly suggestive identification procedures.

The second portion of Petitioner's assertion of innocence is bottomed on an allegation which was raised in Petitioner's first petition for writ of habeas corpus in 1979, but later withdrawn and abandoned as being not well founded.

Simply put, Petitioner asserts that the sole predicate for his conviction and sentence was the identification by Mrs. Turman and Mr. Phillip Arnold. He ignores all other evidence establishing guilt and ignores the finding by this court in **Darden v. Wainwright**, 106 S.Ct. at 2473, that "the weight of the evidence against Petitioner was heavy; the 'overwhelming eyewitness and circumstantial evidence to support a finding of guilt on all charges.'. . ."

In reviewing this claim, the Eleventh Circuit took a two-prong approach. First the court concluded that the issue had been previously abandoned in Petitioner's first habeas corpus petition:

> Intentional abandonment of a claim is precisely the context that application of the concept of abuse of the writ is intended to address. Witt, 755 F.2d at 1397. Petitioner may be deemed to have waived his

> right to a hearing on a successive application for federal habeas relief when he deliberately abandons one of his grounds at the first hearing. Kuhlmann, 106 S.Ct. at 2622, n.6; Sanders, 373 U.S. at 18 [cite omitted]; Wong Doo v. United States, 265 U.S. 239, 241, 44 S.Ct. 524, 525, 68 L.Ed. 999 (1924). "The petitioner had full opportunity to offer proof . . . [on this claim] at the hearing on the first petition, and, if he was intending to rely on that ground, good faith required that he produce the proof then." Wong Doo, 265 U.S. at 241, 44 S.Ct. at 525. Federal courts will not "tolerate needless piecemeal litigation, or . . . entertain collateral proceedings whose only purpose is to vex, harass, or delay." Sanders, 373 U.S. at 18, 83 S.Ct. at 1078.

Darden v. Dugger, 825 F.2d at 294

The court, in finding that the abandonment herein clearly evidenced abuse, applied the second part of its analysis to determine whether Petitioner's contentions of innocence merited relief. After reviewing the record in its totality, the Eleventh Circuit concluded that Petitioner was not entitled to a hearing on the claim and the ruling by the district court was proper, that this claim was barred based upon abuse of the writ.

Respondent would submit this Court should concur.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that copies of the foregoing Response to Petition for Writ of Certiorari have been furnished counsel for Petitioner by hand delivering copies of the same to them at the following addresses on the 20th day of January, 1987:

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